MOTION FILED
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No. 87-470

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FORT WAYNE BOOKS, INC.,

Petitioner,

vs.

STATE OF INDIANA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Indiana

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF VIDEO SOFTWARE DEALERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Video Software Dealers Association (VSDA) hereby respectfully requests leave to file the accompanying Brief *Amicus Curiae* in support of Petitioner. VSDA regrets that it must bother the Court with this Motion, but while Petitioner has consented to VSDA's participation, Respondents have refused. Since VSDA believes that this case is a vitally important one, with potentially profound implications for the First Amendment rights of its members and their customers, it has no choice under the rules of the Court but to file this Motion.

VSDA is the primary national trade association of dealers offering prerecorded video programming to the public for purchase or rental. VSDA is composed of over 3,000 regular members, representing 15,000 to 20,000 of the approximately 25,000 retail video store outlets in the United States. In addition, VSDA has an associate membership that includes the major motion picture companies, independent video producers and manufacturers of various products related to the video industry.

Sale and rental of video cassettes for home viewing is a large and rapidly growing industry. The population of video cassette recorders has soared in this decade: in 1980 only 2.7 percent of the nation's television households had such devices, while 49.7 percent of today's television households rely on them to view an average of 75,000,000 films each week rented from retail outlets nationwide.[1] The tremendous ex-

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[1] The *Washington Post* reported on August 28, 1985 the historical 1980 population of VCRs in the United States. *Communications Daily*

pansion of the number of video cassette recorders and corresponding number of retail outlets for rental or sale of video cassettes demonstrate that video cassettes have become a highly desirable and socially prevalent medium of expression that also gives individual consumers freedom to choose what they decide is suitable for viewing in the privacy of their homes.

Given the sizable universe of titles from which VSDA members must choose and the substantial number of titles which they must stock to meet consumer demand, it is inherently impossible for each retailer to review each title. VSDA's members typically carry an average of 2,417 different titles on their shelves, including motion picture films, sporting events, documentaries, musical productions and educational aids.[2] VSDA members choose their inventories from 17,000 titles available for distribution in the United States. Of these titles, the producers have characterized 3,300 to be adult films, generally based on subjective criteria.[3] Of the 77 percent of the retail outlets owned by VSDA members which carry adult films, approx-

reported on August 20, 1987 at 5 the vast increase in these devices, citing Nielsen figures. Statistics on the number of video software rentals per week were supplied to VSDA by Alexander & Associates, a consumer marketing consultant for the home entertainment industry.

[2] Unless otherwise noted, the following factual material is taken from a 1986 VSDA Annual Survey, which is a report on the business operations of a representative group of the regular members of VSDA.

[3] Videolog (video title looseleaf service), issue 33-1, August 14, 1987. These figures represent the number of films economically marketed by typical video retail stores within the United States. Characterizations of the films are made on the basis of distributor information which may not be applicable in certain jurisdictions where standards for what is or is not an adult film may differ.

imately 13 percent of their inventory consists of such materials.

The decision below threatens the ability of VSDA members to continue offering the variety of programming presently available. It employs a state RICO statute, fashioned after the federal statute, to justify the seizure of books, video cassettes, magazines and other material presumptively entitled to First Amendment rights on the basis of an *ex parte* affidavit stating that the material is the product of an enterprise derived from the sale or distribution of obscenity. The Court below did not require any adversarial judicial determination as to whether the seized material was obscene or otherwise comport with any of the requirements that this Court has imposed on those seeking to silence obscene materials.

VSDA is concerned that, if the judgment below is not reversed, it will have a profound chilling effect on video dealers, forcing them to shy away from movies containing nudity or other material that might result in a charge that the movies are obscene, even though many of these movies are classics and winners of numerous awards. This chill is not limited to video dealers, but will also be felt by bookstores, movie theaters and other media of mass communication. Indeed, given the sweep of the RICO statute, the chilling effect of the state court's decision will also extend to those engaged in the distribution and production of artistic, cultural and political works. This case, therefore, raises serious constitutional concerns and has implications far beyond Indiana, since the Indiana statute at issue here is similar to the RICO laws of other states and to the federal RICO statute.

As the representative of the nation's video cassette industry, VSDA believes that its participation in this proceeding will facilitate the Court's understanding of the issues raised and their implications for the full, free, and unfettered enjoyment in the privacy of the home of programming that video cassettes have made available to the American people. Accordingly, VSDA respectfully requests leave to file a Brief *Amicus Curiae* in the above-captioned case.

Respectfully submitted,

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INTERESTS OF AMICUS CURIAE

The interests of the Video Software Dealers Association (VSDA) as *amicus curiae* is set forth in VSDA's accompanying motion for leave to file this brief.

REASONS FOR GRANTING THE WRIT

I

THIS CASE WILL CLARIFY NATIONWIDE THE MANNER IN WHICH RICO STATUTES MAY BE EMPLOYED WHERE THEY AFFECT FUNDAMENTAL FIRST AND FOURTEENTH AMENDMENT RIGHTS.

This case deals with the power of a State to use its RICO statute to seize, on the basis of an *ex parte* affidavit, material presumptively protected by the First Amendment to the United States Constitution, as applied to the States by the Fourteenth Amendment. The decision below upheld the abrupt padlocking of bookstores and seizure of their books without affording their owners either a prompt opportunity to contest whether any of the seized material was obscene or a prompt opportunity to seek appellate review of any initial determination that it was obscene. These actions were taken without any allegation that all, or even a substantial proportion, of the materials seized were obscene.

The Indiana statute which authorized these actions is modeled after the federal Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. § 1961 *et seq.* It is similar to the RICO statutes adopted by at least nine states that are modeled on the federal statute and that make obscenity a predicate to seizures and penal forfeitures. Thus, the decision below,

while decided on the basis of the Indiana statute, will color the manner in which prosecutors may apply the federal and other state statutes as well. Unless reversed, the decision below will sanction the preemptive use of RICO statutes by prosecutors across the nation to silence rights protected by the First Amendment.[1]

The Indiana Supreme Court justified the confiscation of the books, magazines and other material here on the grounds that the seized material was the product of an enterprise derived from unlawful activity. The Court reasoned that the RICO statute and seizure were not intended to restrain the exercise of speech, but rather to deny to those engaged in unlawful criminal activities the fruit of their illegal pursuits. This decision places squarely in issue whether a RICO statute may be treated solely as a penal enforcement vehicle without reference to First Amendment standards developed over two decades by this Court. Such a theory directly conflicts with this Court's decisions holding that statutes cannot be tested solely by ref-

[1] Federal prosecutors have already commenced the first federal RICO cases predicated upon alleged violations of obscenity statutes. *United States v. Pryba et al.*, E.D. Va., No. CR 87-00208-A (indictment filed August 13, 1987); *United States v. Sturman et al.*, D. Nev., No. CR-S-87-278 (indictment filed Oct. 7, 1987). As the Indiana Supreme Court noted, under the federal RICO statute, convictions for the predicate offense are not required to order a seizure. 504 N.E.2d at 566. As a result, federal prosecutions can proceed in the same manner as in this case, with federal prosecutors seeking *ex parte* orders seizing expressive material and associated neutral instrumentalities on the basis of alleged obscene material not yet subject to trial or appellate review. *See J.N.S., Inc. v. State of Indiana*, 712 F.2d 303, 306 (7th Cir. 1983).

erence to their alleged purpose, but must be assessed by their effect and operation and by the nature of the rights involved. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981); *Near v. Minnesota*, 283 U.S. 697, 708 (1931). *Cf. Arkansas Writers' Project, Inc. v. Ragland*, 107 S.Ct. 1722, 1727 (1987) ("Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment").

This case is of substantial importance to the public because it affects their ability to view programming and acquire books presumptively protected by the First Amendment. Under the decision below, prosecutors need not prove that a criminal enterprise exists or that the speech involved is obscene before seizing the contents of bookstores or other media outlets. Instead, it is sufficient that a probable cause affidavit be filed *ex parte* to shut down a business, with a trial only being required after a "reasonable time." In petitioner's case, that "reasonable time" included an entire year during which its bookstores were padlocked before a stay of the underlying *ex parte* order was granted. The decision below would also allow seizure, en masse, of books, video cassettes and other media of mass communications that are not obscene but are fully subject to the First Amendment's protection as long as an affidavit was submitted alleging that those media were acquired with the products of a criminal activity. Finally, the decision below permits the government to close outlets for protected First Amendment expression solely because two or three of the thousands of items disseminated through those outlets are unprotected.

II

THE USE OF A RICO STATUTE TO RESTRAIN PRESUMPTIVELY PROTECTED SPEECH ON THE BASIS OF PREVIOUS UNPROTECTED SPEECH RAISES EXTREMELY IMPORTANT FEDERAL QUESTIONS WHICH THIS COURT SHOULD RESOLVE.

A. The Decision Below Subjects Distributors of Protected Speech to Prior Restraints.

The Indiana Supreme Court upheld seizures of large quantities of material before there was any showing in an adversarial proceeding that the material itself was obscene, and without a prompt judicial determination after the seizures that the material was obscene. The seizures directly prevented the owners of the bookstores from exercising their First Amendment right to distribute books of their choosing because all of the items necessary to conduct the business were also seized. Under these circumstances, the decision below countenances a classic prior restraint that can be justified under the First Amendment only by the most compelling governmental interests. *Near v. Minnesota*, 283 U.S. 697 (1931). No attempt was made below by the government to meet that standard.

Numerous decisions have condemned ordinances and statutes authorizing revocation of adult theatre business licenses based on previous distribution of obscene materials as incompatible with the First Amendment because they impose a prior restraint on presumptively protected expression. *E.g., City of Paducah v. Investment Entertainment*, 791 F.2d 463 (6th Cir.), *cert. denied*, 107 S.Ct. 316 (1986); *Gayety Theatres, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir. 1983); *Entertainment Concepts, Inc., III v. Maciejewski*, 631

F.2d 497 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981). If revoking business licenses as punishment for obscenity convictions is a prior restraint, then seizing a business altogether, with or without previous obscenity convictions, must *a fortiori* be an unconstitutional abridgement of First Amendment rights.

Indeed, the considerations on which the prosecution, and ultimately the Indiana Supreme Court, sought to justify the seizure of materials here are analogous to the considerations that most lower courts have found to be inadequate to sustain so-called "padlock" laws against First Amendment challenge. Those laws authorize the government to close a place of business in response to previous obscenity convictions. While a substantial number of state statutes have relied on the nuisance rationale to control obscene speech in this manner, few of these statutes have been upheld because they act as prior restraints on protected speech. *Compare Universal Amusement Co. v. Vance*, 587 F.2d 159 (5th Cir. *en banc* 1978) (nuisance statute providing for 1 year closure of businesses distributing obscene materials held an unconstitutional prior restraint), *aff'd on other grounds*, 445 U.S. 308 (1980) *with State ex rel. Kidwell v. U.S. Marketing, Inc.*, 102 Idaho 451, 631 P.2d 622 (1981), *appeal dismissed*, 455 U.S. 1009 (1982) (upholding constitutionality of nuisance abatement statute).

The Indiana Court of Appeals in its thorough analysis of this case, analogized the Indiana statute to the padlock laws, 479 N.E.2d at 587-90, and found that statute unconstitutional. It noted that "'evidence of obscene conduct in the past does not justify enjoining future conduct which is protected by the First Amendment...,'" *id.* at 588 (citation omitted), and that

the padlock cases establish that the "*Near* doctrine not only extends to the bookstore premises and to their inventories of films and publications, but also forbids the confiscation or forfeiture of the neutral instrumentalities used for communicative purposes as well." *Id.* at 589. The State Supreme Court decision sidesteps these holdings and its conclusion conflicts with the vast weight of constitutional authority setting forth a "longstanding hostility to any system of prior restraints under our [federal] Constitution." *Id.* at 592.

B. The Decision Below Ignores Virtually Every Supreme Court Decision Over the Last Twenty Years Dealing With the Regulation of Obscene Speech.

The Indiana Supreme Court treated this case as if it were a RICO enforcement action against illegal enterprises involving gambling, drugs or other contraband, and ignored the serious First Amendment difficulties posed by its analysis. In so doing, it ignored the decisions of this Court holding that standards for suppressing gambling and similar crimes cannot establish the level of constitutional protection for regulations aimed at expressive activity. *E.g., Vance v. Universal Amusement Co.*, 445 U.S. at 315 (regulation of communicative activity requires more narrowly drawn procedures than those necessary for abatement of ordinary nuisances); *Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 211-12 (1964) (standards for search and seizure of materials presumptively protected by First Amendment are higher than those for other contraband); *Marcus v. Search Warrant*, 367 U.S. 717, 730-31 (1961)(searches and seizures).

The result of this faulty premise is that the court failed to honor basic First Amendment requirements. As Petitioner has described to this Court, the Indiana Supreme Court's decision conflicts with decisions:

- requiring notice and prior adversarial hearing before authorizing seizures and padlocking of businesses engaged in First Amendment activity. *E.g., Heller v. New York*, 413 U.S. 483 (1973); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979).

- invalidating interim seizures and padlocking orders of indefinite duration. *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980); *Freedman v. Maryland*, 380 U.S. 51 (1965).

- requiring prompt appellate review of interim or permanent restraints on speech. *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977).

- suggesting the unconstitutionality of restraints based only upon a probable cause standard of proof of obscenity. *California ex rel. Cooper v. Mitchell Bros.*, 454 U.S. 90 (1981).

The effect of ignoring these constitutional requirements is to deny speakers such as VSDA's members and their customers basic First Amendment protections. These decisions reflect this Court's careful and deliberative refinement over twenty years of the appropriate balance between the rights of free speech and governmental efforts to regulate obscene speech. The asserted ability of the State of Indiana to avoid these requirements altogether by relying on a RICO enforcement scheme raises critical constitutional questions that this Court should address.

C. The Decision Below Will Produce a Substantial Chilling Effect on the Distribution of Protected Speech.

The sweeping effect of the decision of the Indiana Supreme Court will have a substantial chilling effect on every distributor and retailer of video cassettes across the nation. The Indiana statute is modeled after the federal RICO statute as are many other state statutes. Federal prosecutors are already using the federal statute in a fashion sanctioned by the Indiana court and it is not unreasonable to assume that other states will follow suit. Faced with the seizure of their entire stock in trade and padlocking of their stores, video dealers, just as any other business person, will naturally avoid any materials which present a risk of drawing RICO prosecutions.

Given the large number of video cassette titles and the obvious impossibility of reviewing each title individually, dealers may avoid distributing all but the most innocuous materials. Dealers will not even be able to rely solely on traditional movie ratings for fear that prosecutors in a particular jurisdiction will allege two or more of the R-rated materials are obscene and thus subject a dealer to RICO enforcement actions. *Cf. Jenkins v. Georgia,* 418 U.S. 153 (1974) (reversing state court holding film "Carnal Knowledge" to be obscene).

The drastic sanctions of the RICO statute, which the court below held could be imposed on the basis of no more than an *ex parte* affidavit, can put a distributor of protected speech out of business either temporarily or permanently. When the material seized is not in fact obscene, the act of confiscation has caused a truly irreparable injury to both the dealer and its customers. *Elrod v. Burns,* 427 U.S. 347, 373

(1976) (loss of First Amendment freedoms for even a minimal period "unquestionably constitutes irreparable injury"). Even where some of the seized materials are ultimately held obscene, seizing the entire contents of a bookstore, including all the protected material and neutral instrumentalities within the store, prevents the bookstore owner from engaging in rights protected by the First Amendment. In either case, the chilling effect of the decision below will extend to protected speech far from the boundaries of obscenity, simply because the government's enforcement tool is so indiscriminate. Before the chill is felt widely, this Court should review the decision below to resolve the serious First Amendment questions at issue.

CONCLUSION

For the reasons set forth herein, VSDA urges that this Court grant a writ of certiorari to the Supreme Court of the State of Indiana in order to review the serious constitutional issues raised below.

Respectfully submitted,

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